

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

\* \* \* \* \*

ARENDI USA, INC., ET AL. \* CA 02-343T

VS. \* 2:00 P.M.

\* SEPTEMBER 27, 2004

MICROSOFT CORPORATION, ET AL. \*

\* PROVIDENCE, RI

\* \* \* \* \*

BEFORE THE HONORABLE ERNEST C. TORRES

CHIEF DISTRICT JUDGE

(RULE 50 MOTIONS)

APPEARANCES:

FOR ARENDI U.S.A. INC:

MINTZ, LEVIN, COHN, FERRIS,  
GLOVSKY & POPEO, PC  
BY: PAUL J. HAYES, ESQUIRE  
BY: EUGENE A. FEHER, ESQUIRE  
ONE FINANCIAL CENTER  
BOSTON, MA 02111

TAYLOR, DUANE, BARTON & GILMAN,  
LLP  
BY: SHERI L. PIZZI, ESQUIRE  
10 DORRANCE STREET - SUITE 700  
PROVIDENCE, RI 02903

1 FOR MICROSOFT CORPORATION:

2 FISH & RICHARDSON, P.C.  
3 BY: FRANK E. SCHERKENBACH, ESQ.  
4 BY: CRAIG R. SMITH, ESQUIRE  
225 FRANKLIN STREET  
BOSTON, MA 02110-2804

5 FISH & RICHARDSON, P.C.  
6 BY: JENNIFER K. BUSH, ESQUIRE  
12390 EL CAMINO REAL  
7 SAN DIEGO, CA 02130

8 EDWARDS & ANGELL  
9 BY: PATRICIA SULLIVAN, ESQUIRE  
2800 FINANCIAL PLAZA  
10 PROVIDENCE, RI 02903

11 ISABELLA FU, ESQUIRE  
12 MICROSOFT IN-HOUSE COUNSEL

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25 COURT REPORTER: ANGELA M. GALLOGLY, RPR  
ONE EXCHANGE TERRACE  
PROVIDENCE, RI 02903

1       SEPTEMBER 27, 2004 - 2:00 P.M.

2               THE COURT:   GOOD AFTERNOON.

3               COUNSEL, THE CLERK, I BELIEVE, HAS DISTRIBUTED  
4       TO YOU A COPY OF THE COURT'S CLAIM CONSTRUCTION ORDER,  
5       SO I THINK ALL WE NEED TO ADDRESS AT THE MOMENT BEFORE  
6       WE HAVE OUR CHARGE CONFERENCE IS THE MOTION FOR  
7       JUDGMENT AS A MATTER OF LAW THAT MICROSOFT WISHES TO  
8       MAKE.

9               MR. SCHERKENBACH:   YES, YOUR HONOR.   THANK YOU.

10              THE FIRST MOTION IS ON THE ISSUE OF  
11       INFRINGEMENT, AND PARTICULARLY IN VIEW OF THE CLAIM  
12       CONSTRUCTION THAT WAS JUST HANDED OUT, WE BELIEVE IT'S  
13       CLEAR AS A MATTER OF LAW THAT MICROSOFT CANNOT INFRINGE  
14       THE ARENDI PATENT FOR TWO INDEPENDENT REASONS.

15              FIRST OF ALL, THERE IS USER SELECTION OF TEXT  
16       REQUIRED BEFORE ANY ENTRY OF AN EXECUTE COMMAND; AND  
17       THE SECOND REASON IS THAT THE ANALYSIS OF THE DOCUMENT  
18       TO DETERMINE WHAT THE FIRST INFORMATION IS, WHICH THE  
19       PARTIES HAVE AGREED IS TEXT ENTERED BY A USER, THAT  
20       HAPPENS IN THE ACCUSED PRODUCT BEFORE ANY SINGLE ENTRY  
21       OF AN EXECUTE COMMAND.

22              THE COURT:   AREN'T THOSE BOTH JURY QUESTIONS?

23              MR. SCHERKENBACH:   THEY ARE FACTUAL QUESTIONS,  
24       ULTIMATELY, FOR THE JURY, BUT GIVEN, NUMBER 1, THE  
25       AGREED OR ORDERED CLAIM CONSTRUCTION, AND, NUMBER 2,

1 THE WAY THE EVIDENCE HAS COME IN, I DON'T BELIEVE ANY  
2 REASONABLE JURY COULD FIND AGAINST MICROSOFT ON EITHER  
3 OF THOSE ISSUES.

4 SO THAT WOULD BE OUR FIRST RULE 50 MOTION, AND I  
5 HAVE OTHERS, WHICH I WOULD LIKE TO PUT IN THE RECORD.

6 THE SECOND RULE 50 MOTION IS ON THE QUESTION OF  
7 ANTICIPATION. WE WOULD MOVE FOR JUDGMENT AS A MATTER  
8 OF LAW IN ANTICIPATION BY THE ADDRESSMATE PLUS USER'S  
9 MANUAL, THE ADDRESSMATE PLUS PRODUCT, AND SPECIFICALLY  
10 THE RETRIEVE ADDRESS FUNCTION OF THE PRODUCT, THE  
11 CLARIS EMAILER WITH APPLE DATA DETECTORS PRODUCT, THE  
12 COREL WORDPERFECT 7 PRODUCT, AND THAT INCLUDES TWO  
13 FEATURES, BOTH OF WHICH IN OUR VIEW ANTICIPATE, SO,  
14 SPELLCHECKER AND QUICKCORRECT, AND THE LAST BASIS WOULD  
15 BE THE LANG PATENT REFERRED TO HERE IN TESTIMONY AS THE  
16 IBM PATENT. WE BELIEVE EACH OF THOSE ANTICIPATES THE  
17 CLAIM, FRANKLY, UNDER ANY CLAIM CONSTRUCTION AND THAT  
18 NO REASONABLE JURY COULD FIND OTHERWISE.

19 THE THIRD MOTION RELATES TO A CATEGORY OF  
20 ACCUSED PRODUCTS THAT WE BELIEVE WERE NEVER ADDRESSED  
21 IN THE EVIDENCE. SPECIFICALLY THERE IS AN ACCUSED  
22 PRODUCT CALLED MICROSOFT WORKS SUITE, THAT'S ONE, AND  
23 THE SECOND IS STANDALONE MICROSOFT PRODUCTS. SO  
24 STANDALONE MICROSOFT WORD, STANDALONE MICROSOFT EXCEL,  
25 AND SO FORTH. NONE OF THOSE PRODUCTS INCLUDES

1 MICROSOFT OUTLOOK. MICROSOFT OUTLOOK IS THE ONLY  
2 RECORD RETRIEVAL PROGRAM IDENTIFIED BY ARENDI DURING  
3 THE COURSE OF THIS TRIAL, THE ONLY ONE IDENTIFIED BY  
4 MR. KLAUSNER, IN PARTICULAR. SO IN THAT CASE WE THINK  
5 THERE'S SIMPLY BEEN A FAILURE OF PROOF AS TO THOSE  
6 PARTICULAR PRODUCTS.

7 THE FINAL MOTIONS, YOUR HONOR, IN OUR VIEW, ARE  
8 BOTH LIABILITY RELATED, AND ARGUABLY, DAMAGES RELATED,  
9 BUT, AGAIN, TO PROTECT OUR RECORD, WE BELIEVE WE NEED  
10 TO MAKE THEM AT THIS TIME.

11 FIRST OF ALL, THERE CAN BE NO DIRECT  
12 INFRINGEMENT OF ANY OF THE ASSERTED CLAIMS WITHOUT  
13 ACTUAL USE OF THE ACCUSED SMART TAGS FEATURE, IN OTHER  
14 WORDS, SELLING THE PRODUCT ALONE, IT IS NOT A USE OF  
15 THE FEATURE AND IT IS NOT A USE OF THE METHOD COVERED  
16 BY THE PATENT.

17 THE COURT: I THOUGHT THAT HAD BEEN DISCUSSED,  
18 AND WE HAD ALL AGREED THAT THAT WOULD BE AN ISSUE TO BE  
19 ADDRESSED AT STAGE 2, IF THERE IS A STAGE 2?

20 MR. SCHERKENBACH: WE AGREED THAT IT RELATES, I  
21 THINK, FUNDAMENTALLY, TO DAMAGES, YOUR HONOR. I,  
22 FRANKLY, I BRING THE MOTION BECAUSE IN OUR VIEW THERE  
23 IS SOME CHANCE THAT THE APPELLATE COURT MIGHT SEE IT  
24 THE OTHER WAY AND I DO WANT TO PROTECT OUR RECORD ON  
25 THIS ISSUE. I UNDERSTAND THAT WE'VE AGREED THAT THE

1 COURT WON'T DECIDE THE EXTENT OF THE USE OF THE METHOD  
2 AND SO FORTH UNTIL THE DAMAGES PART OF THE TRIAL AND  
3 WE'RE FINE WITH THAT. THE MOTION GOES TO WHETHER THERE  
4 WOULD BE ANY INFRINGEMENT AT ALL WITHOUT DEMONSTRATING  
5 ACTUAL USE OF THE PRODUCTS, AND WE DID STIPULATE THERE  
6 IS SOME USE, TRUE; BUT THE EXTENT OF THE USE IS  
7 DISPUTED, AND, THEREFORE, THE EXTENT OF THE  
8 INFRINGEMENT, WE THINK, IS DISPUTED, THE EXTENT OF THE  
9 INFRINGEMENT.

10 THE OTHER MOTIONS ARE, AGAIN, ONLY TO THE EXTENT  
11 THAT THE EXTENT OF THE INFRINGEMENT QUESTION IS VIEWED  
12 AS A LIABILITY QUESTION AS OPPOSED TO A DAMAGES  
13 QUESTION. THERE'S BEEN NO -- WELL, ACTUALLY, STRIKE  
14 THE LAST TWO. I'LL JUST STOP AND REST ON THE ONE THAT  
15 I MADE, THE PRIOR ONE THAT I MADE.

16 SO THOSE ARE THE MOTIONS FOR JUDGMENT AS A  
17 MATTER OF LAW THAT MICROSOFT WOULD BRING AT THIS TIME.

18 THE COURT: WELL, I THINK THAT THIRD ONE, BEFORE  
19 I EVEN GET TO MR. HAYES' ARGUMENT, CAN YOU EXPLAIN TO  
20 ME WHY I SHOULDN'T DENY THE THIRD MOTION OUT OF HAND ON  
21 THE GROUND THAT THIS CASE WAS BIFURCATED AND WE'VE BEEN  
22 PROCEEDING ON THE PREMISE THAT IN ORDER TO ESTABLISH  
23 INFRINGEMENT, EVEN WITH RESPECT TO CLAIM 16, WHETHER  
24 IT'S CALLED A DEPENDENT OR INDEPENDENT CLAIM, THAT USE  
25 OF SMART TAGS MUST INFRINGE ON ARENDI'S PATENT, AND IF

1 ARENDI DOESN'T GET PAST THAT HURDLE, THEN THAT'S THE  
2 END OF THE CASE. BUT IF THEY DO, WE THEN WOULD BE  
3 ADDRESSING WHETHER, IN ADDITION, CLAIM 16 MIGHT BE  
4 INFRINGED BY SELLING -- MANUFACTURING AND SELLING THE  
5 SOFTWARE PRODUCT THAT CONTAINS THE PROGRAM THAT  
6 PERFORMS THE PATENTED PROCESS; SO I'M STILL BAFFLED AS  
7 TO WHY YOU THINK THAT THAT IS AN ISSUE THAT IS PART OF  
8 THIS PHASE OF THE CASE.

9 MR. SCHERKENBACH: AND, AGAIN, YOUR HONOR, AS WE  
10 HAVE DISCUSSED, NOT TODAY, BUT PREVIOUSLY, MICROSOFT IS  
11 COMFORTABLE RESOLVING THE ISSUE OF THE EXTENT OF THE  
12 USE, IF I CAN PUT IT THAT WAY, IN THE DAMAGES PART OF  
13 THE CASE. THE REASON I MAKE THE MOTION, FRANKLY, IS AS  
14 A FORMALITY, BECAUSE SOME OF THE CASES CAN BE READ TO  
15 SUGGEST THAT IT IS ALSO A LIABILITY ISSUE. IN OTHER  
16 WORDS, PROVING THE EXTENT TO WHICH CUSTOMERS HAVE, IN  
17 FACT, USED THE METHOD THAT IS ACCUSED OF INFRINGEMENT,  
18 AND YOU HAVE TO PROVE THE UNDERLYING PREDICATE ACT IN  
19 ORDER TO BE ENTITLED TO DAMAGES ON THOSE USES.

20 THE COURT: WELL, MAYBE I SHOULD CLARIFY THAT  
21 RIGHT NOW, THEN, THAT IN THE SENSE THAT I WAS USING THE  
22 TERMS WHEN I SAID THAT THE CASE IS BIFURCATED,  
23 LIABILITY IN PHASE 1 AND DAMAGES IN PHASE 2, WOULD BE  
24 CONTRARY TO WHAT YOU JUST SAID, MR. SCHERKENBACH. I  
25 WANT TO MAKE THAT CLEAR. THAT WHAT I INTENDED BY THAT

1 WAS TO DETERMINE WHETHER USE OF THE PATENTED METHOD  
2 WOULD CONSTITUTE INFRINGEMENT, AND IF THE ANSWER IS NO,  
3 AS I SAID A MOMENT AGO, THAT'S THE END OF THE CASE. IF  
4 THE ANSWER IS YES, WE WOULD THEN HAVE TO DETERMINE WHAT  
5 THE EXTENT OF THE DAMAGES IS, WHICH WOULD INCLUDE A  
6 DETERMINATION OF WHETHER MANUFACTURE AND SALE OF AN  
7 APPARATUS THAT IS CAPABLE OF PERFORMING THE PATENTED  
8 METHOD, CAPABLE OF INFRINGING, THAT IS, WOULD ALSO BE  
9 INFRINGEMENT. BUT IT SEEMED TO ME THAT IN INTERJECTING  
10 THAT QUESTION INTO THIS PHASE OF THE CASE WOULD  
11 UNNECESSARILY CLUTTER THE MATTER AND CONFUSE THE  
12 ISSUES. SO I JUST WANT TO MAKE THAT CLEAR.

13 MR. HAYES, WHAT DO YOU HAVE TO SAY?

14 MR. HAYES: SIMPLY, JUDGE, HIS ARGUMENT ON  
15 INFRINGEMENT, INFRINGEMENT IS A QUESTION OF FACT, IT'S  
16 FOR THE JURY.

17 WITH REGARD TO ANTICIPATION, AGAIN THAT'S A  
18 QUESTION OF FACT FOR THE JURY.

19 WITH REGARD TO THE STANDALONE ARGUMENT, OUR  
20 WITNESS TESTIFIED IN THE EFFORT OF EXPEDITION, NOT  
21 HAVING TO APPLY EACH CLAIM TO A THOUSAND PRODUCTS, THAT  
22 THEY BASICALLY ALL OPERATE IN THE SAME MANNER. SO, I  
23 MEAN THAT'S A FACTUAL QUESTION, AGAIN, FOR THE JURY.

24 AND WITH RESPECT TO THE OTHER ONE, MY  
25 UNDERSTANDING IS THEY STIPULATED TO THE USE, SO THAT'S



1       OUR POSITION.

2               THE COURT:  I DON'T UNDERSTAND YOUR POSITION,  
3       MR. HAYES, ON THE THIRD -- I THINK IT WAS THE THIRD  
4       POINT THAT MR. SCHERKENBACH MADE ABOUT WORKS SUITE AND  
5       STANDALONE.

6               MR. HAYES:  YES.  I BELIEVE, YOUR HONOR, THAT  
7       THOSE WERE -- KLAUSNER IDENTIFIED THOSE AS ACCUSED  
8       PRODUCTS AND AT THE END TESTIFIED THAT, IN FACT, THEY  
9       OPERATE IN THE SAME WAY, AND THE CLAIM APPLIES TO THEM  
10      IN THE SAME MANNER AS HE DID WITH RESPECT TO ALL THE  
11      OTHER PRODUCTS.  OBVIOUSLY, THERE'S ABOUT TEN OR TWELVE  
12      OF THESE, FOURTEEN OF THESE PRODUCTS, WITHOUT GOING  
13      THROUGH EVERY SINGLE ONE OF THEM.  SO THE EVIDENCE IS  
14      IN THE RECORD, IT'S JUST A QUESTION OF FACT.

15              THE COURT:  WELL, IF I UNDERSTOOD  
16      MR. SCHERKENBACH CORRECTLY, HE WAS SAYING THAT NEITHER  
17      OF THOSE PRODUCTS INCLUDES OUTLOOK, WHICH IS THE ONLY  
18      RETRIEVAL PROGRAM THAT'S BEEN IDENTIFIED.

19              MR. HAYES:  NO, THE PRODUCTS ALL UTILIZE, MY  
20      UNDERSTANDING, AS KLAUSNER SAID, SOME TYPE OF RETRIEVAL  
21      PROGRAM, WHETHER IT BE OUTLOOK OR WHATEVER -- RIGHT,  
22      THEY DON'T -- ACCORDING TO MR. FEHER, THEY DON'T HAVE  
23      OUTLOOK IN THEM LIKE OFFICE XP, BUT FOR THE METHOD  
24      CLAIM THEY UTILIZE OUTLOOK, AND SO IT DOESN'T MATTER.

25              THE COURT:  HAS THERE BEEN EVIDENCE ON THAT

1 POINT?

2 MR. HAYES: YES, SURE. I MEAN, KLAUSNER  
3 TESTIFIED THAT THEY OPERATE JUST LIKE THE REST.

4 THE COURT: SO YOU SAY THERE'S BEEN EVIDENCE ON  
5 THIS POINT AND MR. SCHERKENBACH SAYS THERE HASN'T BEEN.

6 MR. HAYES: I MEAN, I KNOW THERE HAS BEEN  
7 EVIDENCE WITH RESPECT TO MR. KLAUSNER. HE TESTIFIED  
8 THAT OFFICE XP, IT USES OUTLOOK. AND THE OTHER ONES,  
9 THEY DON'T HAVE OUTLOOK IN IT, BUT THEY USE IT AS A  
10 RECORD RETRIEVAL PROGRAM, OBVIOUSLY.

11 THE COURT: WELL, BOTH SIDES HAVE BEEN GETTING  
12 DAILY COPY IN THIS CASE, HAVEN'T YOU?

13 MR. SCHERKENBACH: THE ROUGH TRANSCRIPT, YES.

14 THE COURT: I'D LIKE SOME HELP FROM COUNSEL ON  
15 THIS POINT. IF YOU CAN IDENTIFY FOR ME, MR. HAYES, THE  
16 PORTIONS OF THE TESTIMONY OF MR. KLAUSNER IN WHICH YOU  
17 SAY HE REFERS TO THESE THINGS, AND I GUESS YOU CAN'T  
18 PROVE A NEGATIVE, MR. SCHERKENBACH, SO I'LL HAVE TO  
19 LEAVE THE BURDEN ON YOU TO IDENTIFY FOR ME THAT PORTION  
20 OF THE TRANSCRIPT WHERE HE SAYS THAT.

21 MR. HAYES: YES, SIR.

22 THE COURT: IN THE MEANTIME, I'LL DENY THE  
23 MOTION FOR JUDGMENT AS A MATTER OF LAW WITH RESPECT TO  
24 THE POINT THAT I PREVIOUSLY ADDRESSED ABOUT WHETHER OR  
25 NOT ARENDI HAS TO SHOW THAT THE SALE OF THE PRODUCT

1 WOULD HAVE CONSTITUTED AN INFRINGEMENT, AND I'LL  
2 RESERVE JUDGMENT ON THE REMAINING PORTIONS OF THE  
3 MOTION.

4 MR. SCHERKENBACH: THANK YOU, YOUR HONOR.

5 THE COURT: ALL RIGHT, I'LL SEE COUNSEL IN  
6 CHAMBERS.

7 MR. HAYES: YOUR HONOR, WE WOULD LIKE TO MAKE  
8 MOTION FOR DIRECTED VERDICT ON ONE PARTICULAR ISSUE,  
9 AND THAT IS WITH RESPECT TO THE ADDRESSMATE PRODUCT AND  
10 ALSO WITH RESPECT TO THE APPLE DATA DETECTORS. THE  
11 APPLE DATA DETECTORS, ACCORDING TO THEM, IS USED IN  
12 CONJUNCTION WITH CLARIS EMAILER, AND THE ADDRESSMATE IS  
13 USED IN CONJUNCTION WITH WORD AND A COUPLE OF OTHER  
14 THINGS.

15 AND THE POINT IS THEY'RE LIMITED IN THIS CASE TO  
16 THE ISSUE OF ANTICIPATION. ANTICIPATION, WE ALL KNOW,  
17 AS A MATTER OF FORMBOOK PATENT LAW, YOU CANNOT COMBINE  
18 REFERENCES, IF, IN FACT, YOU WANT TO ESTABLISH  
19 ANTICIPATION. I MEAN IT'S AS CLEAR AS A BELL WHEN IT  
20 COMES TO THE APPLE DATA DETECTORS, THAT THEY'RE  
21 COMBINING IT WITH CLARIS EMAILER, AND IT'S ALSO, I  
22 BELIEVE, CLEAR, WITH RESPECT TO THE ADDRESSMATE  
23 PRODUCT. THEY'RE ATTEMPTING TO COMBINE THE ADDRESSMATE  
24 PRODUCT, WHICH IS THE ACTUAL PRODUCT WITH THE MANUAL,  
25 AND INSIDE THE ADDRESSMATE PRODUCT, THEY'RE REFERRING

1 TO A VARIETY OF OTHER COMPONENTS, WHICH, SIMPLY, I  
2 DON'T THINK IS APPROPRIATE ON THE ISSUE OF  
3 ANTICIPATION.

4 SO I DON'T THINK THOSE -- COMBINING IT WITH  
5 WORD, CORRECT -- SO WITH THAT SAID, I DON'T THINK THEY  
6 SHOULD BE ABLE TO -- THEY CANNOT SUSTAIN THE BURDEN OF  
7 PROOF ON ANTICIPATION, SIMPLY BECAUSE THEY HAVE NOT PUT  
8 FORTH A SINGULAR PRODUCT WHERE THEY DON'T HAVE ALL  
9 THESE COMBINATIONS IN THEM.

10 THANK YOU, JUDGE.

11 MR. SCHERKENBACH: YOUR HONOR, THANK YOU.

12 IT'S NOT CLEAR TO ME WHETHER THE MOTION IS  
13 ADDRESSED TO OUR ENTIRE ANTICIPATION DEFENSE OR ONLY AS  
14 TO CERTAIN REFERENCES. I ASSUME CERTAIN REFERENCES,  
15 SINCE, OF COURSE, WE'VE RELIED ON IBM PRODUCT, WHICH IS  
16 A STANDALONE REFERENCE. WE HAVE RELIED ALSO ON COREL  
17 WORDPERFECT 7 PRODUCT, TWO INDEPENDENT FEATURES, WHICH  
18 IS A STANDALONE PRODUCT. SO THE ARGUMENT THAT  
19 MR. HAYES HAS MADE GOES, AT MOST, TO A COUPLE OF OUR  
20 PIECES OF PRIOR ART.

21 AS TO ADDRESSMATE AND APPLE DATA DETECTORS,  
22 FIRST OF ALL, THE ADDRESSMATE MANUAL ALONE ITSELF IS A  
23 PRIOR ART REFERENCE. WE DID NOT COMBINE IT WITH  
24 ANYTHING. DR. CROFT'S TESTIMONY AS TO THAT MANUAL MADE  
25 THAT CLEAR.

1 AS TO THE PRODUCTS THEMSELVES, IT IS TRUE THAT  
2 JUST LIKE THE PATENT, ADDRESSMATE IS INTENDED TO BE  
3 USED WITH MICROSOFT WORD, OR COULD BE, AND APPLE DATA  
4 DETECTORS IS INTENDED TO BE USED WITH THINGS LIKE  
5 CLARIS EMAILER.

6 THE TESTIMONY ON BOTH OF THOSE, WHAT MR. HAYES  
7 CALLS COMBINATIONS, IS THAT THEY'VE EXISTED IN THE  
8 PRIOR ART AS A SINGLE SYSTEM. IF YOU REVIEW  
9 MR. BLOCK'S TESTIMONY ON ADDRESSMATE, HE MADE CLEAR  
10 THAT ADDRESSMATE, AS AN ADD-ON TO WORD, WAS IN THE  
11 PRIOR ART AND WAS USED, THAT SINGLE SYSTEM WAS USED,  
12 AND IT MAKES IT ONE SYSTEM, ONE PRIOR PUBLIC USE FOR  
13 PURPOSES OF ANTICIPATION.

14 THE SAME IS TRUE FOR APPLE DATA DETECTORS.  
15 MR. MILLER TALKED ABOUT -- IN FACT, HE PERSONALLY  
16 DEMONSTRATED THAT SYSTEM BEFORE THE CRITICAL DATE AS A  
17 STANDALONE SYSTEM THAT HAD THE FEATURES IN WHICH WE  
18 RELY.

19 SO I THINK THE MOTION HAS TO BE DENIED, AND I  
20 THINK THE JURY'S ENTITLED TO FIND THAT BOTH OF THOSE  
21 ARE ANTICIPATING REFERENCES.

22 MR. HAYES: YOUR HONOR, MAY I SAY SOMETHING ON  
23 THAT?

24 THE COURT: VERY BRIEFLY.

25 MR. HAYES: YES. MY BROTHER, WHEN HE OPENED

1       THIS CASE, TOLD THE JURY, AND ALL THEY DID IS THAT  
2       THERE WERE FIVE PIECES OF PRIOR ART, THAT'S A LITTLE  
3       CHECK-BOX OF WHAT THEY ARE. THE PIECE OF PRIOR ART  
4       THAT WE WERE TOLD THAT THEY WERE GOING TO RELY ON WAS  
5       THE ADDRESSMATE PRODUCT. MR. SCHERKENBACH SPECIFICALLY  
6       TOLD THE JURY THAT BLOCK IS GOING TO TELL YOU ABOUT THE  
7       PRODUCT, HE'S GOING TO SHOW YOU HOW IT WORKS, AND THEN  
8       YOU ARE GOING TO DECIDE WHETHER THAT IS THE SAME THING  
9       AS ARENDI'S PATENT CLAIM.

10           WHAT THEY'RE TRYING TO DO NOW IS SWITCH HORSES  
11       AND RELY UPON THE MANUAL, WHICH IS, OBVIOUSLY, NOT THE  
12       PRODUCT AND EXPAND THE PRIOR ART TO THAT WHICH WAS  
13       AGREED, JUST TRYING TO EXPAND THE PRIOR ART. WE'LL  
14       TALK ABOUT MORE OF THAT BACK IN YOUR CHAMBERS ON THE  
15       INSTRUCTIONS, BUT THE FACT IS THEY TELL US THAT THE  
16       PRIOR ART IS THE PRODUCT, THEY TELL THE JURY IT'S THE  
17       PRODUCT, AND NOW MY BROTHER IS TELLING YOU FORGET THE  
18       PRODUCT, IT'S THE MANUAL. AND MR. CROFT TESTIFIED THAT  
19       HE RELIED UPON THE PRODUCT EVEN READING THE MANUAL.

20           I THINK ONE THING WE OUGHT TO GET SQUARE ON THIS  
21       ISSUE OF ANTICIPATION IS WHAT IS THE PRIOR ART THAT  
22       THEY'RE LIMITED TO. THEY CAN'T COME IN AND SAY THE  
23       PRIOR ART IS THE PRODUCT AND NOW TURN AROUND AND SAY  
24       IT'S THE MANUAL.

25           SO I HAVE THE TRANSCRIPT OF THE OPENING, I ALSO

1 HAVE THE CLAIM HERE, THEIR CLAIM, IF YOU WOULD LIKE TO  
2 SEE THEM.

3 THE COURT: THEIR CLAIM, WHAT DO YOU MEAN?

4 MR. HAYES: MAY I APPROACH?

5 THE COURT: IS IT IN EVIDENCE?

6 MR. HAYES: IT IS A DEMONSTRATIVE, JUDGE, THAT  
7 THEY USED WITH THE EXPERT.

8 THE COURT: ALL RIGHT, YOU CAN GIVE THAT TO THE  
9 CLERK.

10 MR. HAYES: THIS IS A TRANSCRIPT OF THE OPENING.

11 THE COURT: ALL RIGHT, I'LL TAKE YOUR MOTION  
12 UNDER ADVISEMENT ALSO, MR. HAYES.

13 WE'LL BE IN RECESS AND I'LL SEE COUNSEL IN  
14 CHAMBERS FOR A CHARGE CONFERENCE.

15 (ADJOURNED 2:30 P.M.)  
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## C E R T I F I C A T I O N

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I, ANGELA M. GALLOGLY, RPR, DO HEREBY

6

CERTIFY THAT THE FOREGOING PAGES ARE A TRUE AND

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ACCURATE TRANSCRIPTION OF MY STENOGRAPHIC NOTES IN THE

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ABOVE-ENTITLED CASE.

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ANGELA M. GALLOGLY, RPR

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